



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 11, 1996

Mr. John T. Richards
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR96-2360

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37516.

The Texas Department of Health (the "department") received a request for a copy of PCA's responses to the Information Packet issued by the department for LONESTAR/HMO contracts. You contend that the requested information is excepted from required public disclosure under section 552.110 of the Government Code as commercial information.

Pursuant to section 552.305 of the Government Code, this office notified PCA of the request for information and provided PCA the opportunity to demonstrate that the requested information is excepted from required public disclosure. PCA has responded to this office and claims that the requested information is excepted under sections 552.104 and 552.110 of the Government Code.

Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body).

Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." PCA claims that the requested information was submitted to the department with the expectation that it would be confidential and that the contract executed with the state indicates that the information is proprietary and that PCA has an expectation of confidentiality and that, therefore, the information is confidential under section 552.110. Governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444

(1986), 437 (1986), 425 (1985).¹ Moreover, information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

Section 552.110 has two parts: trade secrets and confidential commercial or financial information. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

We requested additional briefing on this issue from PCA, but PCA did not submit any additional arguments. Having reviewed PCA's original submission, we conclude that PCA did not establish that the requested information is excepted from disclosure under the second prong of section 552.110.

Section 552.110 also excepts trade secrets. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or

¹See Open Records Decision Nos. 514 (1988), 484 (1987), 479 (1987) (governmental bodies are prohibited from entering into contracts to keep information confidential); *see also* Open Records Decision Nos. 605 (1992), 491 (1988) (governmental body may not use contract to invoke Gov't Code § 552.101).

other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

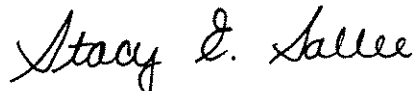
(1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

Although PCA states that it believes the requested information meets the six factors listed in the Restatement, PCA does not demonstrate how the information meets the factors. The generalized arguments presented by PCA concerning the competitive nature of the HMO industry and the ability of the company to negotiate favorable contracts does not constitute a prima facie case for excepting the requested information as a trade secret. Accordingly, the department may not withhold the requested information under section 552.110 as a trade secret. The information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



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Open Records Division

SES/ch

Ref.: ID# 37516

Enclosures: Submitted documents

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